UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

JOSEPH H. SUTTON,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 00-206-P-C***
	)	
DR. RAYMOND E. CULVER, et al.,)		
	)	
Defendants	***)***	

RECOMMENDED DECISION ON MOTION TO DISMISS

The defendants move to dismiss all claims asserted by the plaintiff in this action arising out of an uncompleted real estate transaction. I recommend that the court grant the motion in part and deny it in part.[1]

I. Applicable Legal Standard

The defendants' motion invokes Fed. R. Civ. P. 12(b)(6), which deals with failure to state a claim upon which relief can be granted. Defendants' Motion to Dismiss Complaint Pursuant to Fed. R. Civ. P. 12(b)(6) (Docket No. 2). "When evaluating a motion to dismiss under Rule 12(b)(6), [the court] take[s] the well-pleaded facts as they appear in the complaint, extending the plaintiff every reasonable inference in [his] favor." *Pihl v. Massachusetts Dep't of Educ.*, 9 F.3d 184, 187 (1st Cir.

[1] Also pending is the plaintiff's Motion to Enforce Settlement (Docket No. 5). If the court adopts my recommended decision, the record establishes the existence of factual disputes that will make it necessary to hold a testimonial hearing on that motion.

1993). The defendants are entitled to dismissal for failure to state a claim only if "it appears to a certainty that the plaintiff would be unable to recover under any set of facts." *Roma Constr. Co. v. aRusso*, 96 F.3d 566, 569 (1st Cir. 1996); *see also Tobin v. University of Maine Sys.*, 59 F.Supp.2d 87, 89 (D. Me. 1999).

II. Factual Background

The complaint includes the following relevant factual allegations. The plaintiff, a resident of Texas, began to negotiate in September 1999 with the defendants to purchase real property located in Southport, Maine. Complaint (Docket No. 1) ¶¶ 1, 4-5. Defendant Culver inherited the property in 1996 and conveyed an interest to defendant Rugan as joint tenant in 1997. *Id.* ¶ 4. At one point during the negotiations Culver offered to sell the property for $900,000. *Id.* ¶ 8. The plaintiff promptly accepted this offer, whereupon Culver indicated that he would need to get Rugan's approval of the amount, which he stated he did. *Id.* Culver later informed the plaintiff that he was having personal issues with Rugan, his girlfriend, that he did not think she would carry out the agreement, and that he "did not want to waste" the plaintiff's time. *Id.* ¶ 10. A period of two to two-and-one-half months followed without communication between the parties. *Id.* ¶ 11.

In late February 2000 Culver contacted the plaintiff at his home in Texas and informed him that Culver and Rugan would sell him the property for $950,000 provided that all of the price be paid at closing. *Id.* During this conversation the plaintiff agreed to the price but offered to pay half at closing and the remaining half within one year. *Id.* ¶ 12. Culver indicated that he would have to talk to Rugan and get back to the plaintiff. *Id.* One to two weeks later Culver contacted the plaintiff and accepted his counteroffer on the condition that the balance of the purchase price would be paid by January 15, 2001. *Id.* ¶ 13. The plaintiff accepted this counteroffer. *Id.*

The plaintiff then retained a Maine lawyer to prepare the necessary legal papers to memorialized the transaction and employed other professionals to assist in the closing and "to assist in improving the Property upon closing." *Id*. ¶ 14. The lawyer drafted the necessary paperwork, including proposed contract language to deal with a corrective deed issue. *Id*. ¶ 15. On or about March 21, 2000 the plaintiff's attorney contacted attorney Winslow, whom he understood to represent both Culver and Rugan with respect to the transaction. *Id*. ¶ 16. Winslow requested certain changes in the documents, which were made. *Id*. ¶ 17. On or about March 31, 2000, Winslow informed the plaintiff's attorney that the documents "looked fine." *Id*. ¶ 18. The plaintiff signed the purchase and sale agreement drafted by his attorney, who then mailed the document to Winslow in accordance with Winslow's instructions. *Id*. ¶ 19. On or about April 6, 2000 the plaintiff's attorney received from Winslow "papers" to reopen the estate of Lenore Hilton so that a corrective deed could be issued. *Id.* ¶ 20. Culver had taken title to the property under Hilton's will. *Id*. During a telephone conversation on that day, Winslow informed the plaintiff's attorney that he had not received a required $1,000 deposit. *Id*. During a telephone conversation on or about April 7, 2000 Winslow informed the plaintiff's attorney that his clients "were coming down to sign the contract, but that he needed the deposit delivered." *Id*. ¶ 22.

On or about April 8, 2000 a check for the deposit was delivered to Winslow; the check was endorsed and deposited into his firm's account on or about April 10, 2000. *Id*. ¶ 23. On several occasions between April 8 and April 24, 2000 the defendants either directly or through counsel informed the plaintiff or his agents that the parties had a "deal," and that the defendants intended to sign the purchase and sale agreement but were prevented from doing so by sickness in the family or for other reasons. *Id*. ¶ 24. Late in this period, Culver called the plaintiff and indicated that Rugan had "once again changed her mind." *Id*. ¶ 25. Subsequently the plaintiff and his wife had a telephone

conversation with Rugan in which she indicated that she had some concerns, but that the parties had a deal if the answers to her questions were "favorable." *Id*. The plaintiff answered these questions. *Id.* Rugan indicated that she wanted to confirm these answers with her attorney and said that she would call back promptly if there was any problem. *Id*. She never called back. *Id*. On or about April 24, 2000 Winslow informed the plaintiff's attorney that the defendants were going to sell the property to someone else. *Id*. ¶ 26.

The plaintiff was unable to reach the defendants to obtain an explanation and filed in the Lincoln County Registry of Deeds a Notice of Interest in Real Property, asserting his right to purchase the property for $950,000. *Id*. ¶¶ 27-28. On or about May 8, 2000 the plaintiff had two telephone conversations with Culver in which Culver acknowledged that a "deal" existed between him and the plaintiff but contended that Rugan had never agreed to the deal. *Id*. ¶ 29. On or about May 31, 2000 Winslow contacted the plaintiff's attorney to inquire about the status of the "litigation" between the parties. *Id*. ¶ 30. On or about June 5, 2000 Winslow contacted the plaintiff's attorney to make a new offer to sell the property at the price of $995,000, all of which would be paid at closing on October 1, 2000. *Id*. ¶ 31. On or about June 6, 2000 the plaintiff, through counsel, made a counteroffer of $972,500, payable in full at closing on August 5, 2000. *Id*. ¶ 32.

On or about June 12, 2000 Winslow informed the plaintiff's attorney that the counteroffer was rejected and reiterated the $995,000 offer. *Id*. ¶ 33. He also stated that he had confirmed with Donald Eames, Rugan's attorney, that she had approved the offer and confirmed that all other terms and conditions of the previous agreement would stay in effect. *Id*. On June 12, 2000 Winslow confirmed in writing the defendants' rejection of the $972,500 counteroffer and the fact that the $995,000 offer would remain outstanding until June 16, 2000. *Id*. ¶ 34. On or about June 13, 2000 the plaintiff, through counsel, sent a letter and fax to Winslow and Eames confirming the terms of the $995,000

offer and accepting it. *Id*. ¶ 35. On or about June 14, 2000 Winslow contacted the plaintiff's attorney and confirmed his receipt of the acceptance but stated that the transaction "was off" and that he and Eames had been fired by the defendants after the plaintiff's acceptance of the $995,000 offer. *Id.* ¶ 36. Also on or about that date, the plaintiff's attorney was contacted by the defendants' current counsel and was informed that the defendants intended to sue him for slander of title and related causes of action. *Id*. ¶ 37.

III. Discussion

The complaint includes nine counts, alleging breach of a contract to sell the property for $950,000 and breach of a contract or settlement agreement to sell the property for $995,000; seeking specific performance of each contract; alleging negligent misrepresentation, fraud, promissory estoppel, and violation of the Maine Unfair Trade Practices Act; and seeking punitive damages for fraud. The defendants seek dismissal of each of these claims.

A. Contract Claims (Counts I-IV)

The defendants contend that the plaintiff's claims for breach of contract and specific performance are barred by the Maine statute of frauds. Memorandum of Law in Support of Defendants' Motion to Dismiss Complaint, etc. ("Defendants' Memorandum") (attached to Docket No. 2) at 3-8. The plaintiff argues in response with respect to the $950,000 deal that the endorsement of his deposit check satisfies that statute of frauds, that he has alleged an agreement to make a writing that would satisfy the statute, that he has alleged part performance sufficient to take the agreement outside the statute of frauds, and that Culver has admitted the existence of the agreement, taking it outside the statute. Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss ("Plaintiff's Memorandum") (Docket No. 4) at 1-2. With respect to the $995,000 deal, the plaintiff contends that it

is an enforceable settlement agreement, not subject to the statute of frauds and that, in the alternative, he has alleged sufficient facts to satisfy the statute. *Id*. at 2.

Maine's statute of frauds provides, in relevant part:

> No action shall be maintained in any of the following cases:
>
> * * *
>
> **4. Contract for sale of land**. Upon any contract for the sale of lands, tenements or hereditaments, or of any interest in or concerning them;
>
> * * *
>
> unless the promise, contract or agreement on which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith, or by some person thereunto lawfully authorized; but the consideration thereof need not be expressed therein, and may be proved otherwise.

33 M.R.S.A. § 51.

It is not necessary to address each of the plaintiff's arguments concerning the first alleged agreement, which provides the basis for Counts I and III, because the complaint, read as required in the context of a motion to dismiss under Rule 12(b)(6), alleges that Culver admitted the facts necessary to establish an oral agreement as to himself and that Culver had apparent authority to bind Rugan at the time. *See Paris Util. Dist. v. A. C. Lawrence Leather Co*., 665 F. Supp. 944, 956-57 (D. Me. 1987) (when defendant admits existence of facts necessary to formation of oral agreement, agreement is enforceable despite being within statute of frauds); *Continental Can Co. v. Poultry Processing, Inc.*, 649 F. Supp. 570, 573 (D. Me. 1986) (defendant that admits existence of agreement may not raise statute of frauds as defense); *Rulon-Miller v. Carhart*, 544 A.2d 340, 342 (Me. 1988) (defining apparent authority); *Biron v. Mills*, 519 A.2d 1265, 1267 (Me. 1987) (same). The defendants make factual allegations in their opposition to the motion to enforce settlement that suggest that Rugan in fact did not wish to sell to the plaintiff at any time, but such facts are not to be considered in ruling on a motion to dismiss. The legal standard applicable to a motion for summary judgment or after an evidentiary hearing is not before the court in the context of the pending motion.

With respect to the alleged $995,000 agreement that provides the basis for Counts II and IV, the complaint also contains sufficient factual allegations to take the agreement out of the statute of frauds. An attorney may enter into a binding settlement on behalf of his client if he is authorized to do so. *Michaud v. Michaud*, 932 F.2d 77, 80 (1st Cir. 1991). He may also serve as the lawfully authorized individual who signs a writing that will bind his client or clients for purposes of the statute of frauds. The defendants contend that "Attorney Winslow's lack of authorization is apparent on the face of the Complaint, given Plaintiff's recital of his 'firing' by Defendants. *See* Complaint at ¶ 36." Defendants' Memorandum at 8. To the contrary, the complaint carefully alleges that Winslow was fired by the defendants only after the $995,000 agreement had come into existence. The defendants also argue that the complaint fails to allege that any document signed by Winslow sets forth a clear designation of the property at issue, an essential element under the statute of frauds. *Id*. at 7. In the case upon which they rely, *Gagne v. Stevens*, 696 A.2d 411, 414-16 (Me. 1997), the document at issue included a description of the real property to be sold that could not reasonably be interpreted to describe a single parcel of land on the face of the earth and the Law Court upheld the entry of summary judgment based on the statute of frauds. Here, the property is sufficiently identified in the complaint at paragraph 4. The complaint refers to a draft purchase and sale agreement and proposed contract language to deal with the need for a corrective deed to the property, Complaint ¶¶ 15, 17-20, and alleges that these terms were included in the $995,000 agreement by reference, *id*. ¶ 33. It is reasonable to infer from these alleged facts that a sufficient description of the property was included in these documents. *See generally Galerie D'Tile, Inc. v. Shinn*, 792 S.W.2d 792, 795 (Tex. App. 1990) (parties' full knowledge of property to be conveyed takes in-court settlement agreement concerning conveyance of real property out of statute of frauds).[2]

[2] The plaintiff also argues that settlement agreements are not subject to the statute of frauds even though they may include terms (*continued on next page*)

The defendants are not entitled to dismissal of Counts I-IV.

B. Negligent Misrepresentation (Count V)

The defendants argue initially that they are entitled to dismissal of this claim because it seeks to recover indirectly on agreements that are barred by the statute of frauds. Defendants' Memorandum at 8-9. My conclusion that the complaint states claims in Counts I-IV that are not necessarily barred by the statute of frauds renders this argument unavailable. In the alternative, the defendants contend that the complaint fails to allege all of the necessary elements of a claim for negligent misrepresentation. The parties agree that the elements of this claim are set forth in *Chapman v. Rideout*, 568 A.2d 829 (Me. 1990):

> One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Id. at 830 (quoting Restatement (Second) of Torts § 552(1)) (emphasis omitted).

The defendants contend that the only false information alleged in the complaint to have been communicated concerned their state of mind which "is not factual information at all." Defendants' Memorandum at 9. The only authority cited in support of this assertion is *Morrow v. Moore*, 98 Me. 373 (1903), which the defendants assert states that "a property owner does not have a duty actionable in negligence to keep a prospective purchaser apprised of his intentions." *Id*. at 9-10. Such was not the issue in *Morrow*, which was a suit arising out of the stopping of payment on a check. The *dicta* to which the defendant apparently refer merely states that a seller of real property has no duty to inform a

affecting the conveyance of real property, citing *Moran v. Gallo*, 1999 WL 643397 (Conn. Super. Aug. 13, 1999), at *2; and *Vogt v. Bartelsmeyer*, 636 N.E.2d 1185, 1191 (Ill. App. 1994). The Law Court's decision in *Loe v. Town of Thomaston*, 600 A.2d 1090, 1092 (Me. 1991), strongly suggests that Maine law is to the contrary; the court addresses the question whether a settlement agreement satisfies the statute of frauds.

(*continued on next page*)

prospective buyer that he is willing to accept less for the property than the buyer appears willing to pay. In any event, the defendants' argument is incorrect. As the Restatement (Second) of Torts makes clear, a representation concerning the defendant's state of mind is a factual representation, and a misrepresentation of the maker's own intention to do a particular thing may be actionable:

> A representation of the maker's own intention to do or not to do a particular thing is fraudulent if he does not have that intention.
>
> * * *
>
> [Comment] a. The state of a man's mind is as much a fact as the state of his digestion.

Restatement (Second) of Torts § 530 & comment a (1977). *See also* comment c.

The defendants also contend, without citation to authority, that the complaint fatally fails to allege the existence of a duty of reasonable care in communicating information and "any actual change of position such as would satisfy the tort's 'justifiable reliance' requirement." *Id*. at 10. The plaintiff does not respond to these arguments. However, the existence of such a duty is a reasonable inference to be drawn from paragraph 60 of the complaint and, for pleading purposes, paragraph 61 adequately alleges reliance.

The defendants are not entitled to dismissal of Count V.

C. Fraud (Count VI)

The defendants contend again, with respect to this claim, that "communications during the negotiating process respecting a seller's state of mind are not actionable as 'false information' or as 'material misrepresentations of fact,'" again without citation to authority. Defendants' Memorandum at 10. As noted above, this assertion is incorrect. Next, the defendants assert that "the facts fail to support a showing that [the plaintiff] irretrievably changed his position in reliance on Defendant's [sic] alleged 'material misrepresentations.'" *Id*. at 10-11. This argument appears on its face to be

appropriate for a motion for summary judgment rather than to support a motion to dismiss. The defendants cite no authority to support their necessarily-implied argument that the nature of the alleged detrimental reliance must be spelled out in the complaint and that the only details of the alleged reliance included in this complaint are insufficient as a matter of law because they are "hardly the type of reliance which the tort contemplates." *Id*. at 11.

The defendants fare better with their argument that the complaint fails to plead fraud with the degree of particularity required by Fed. R. Civ. P. 9(b). The plaintiff responds in conclusory fashion: "Plaintiff has satisfied the pleading requirements of Rule 9(b) Fed.R.Civ.P. by pleading the facts underlying the fraud claim with sufficient particularity. Complaint at ¶¶ 11-36 and 62-67." Plaintiff's Memorandum at 19. He also suggest that the defendants "are uniquely in possession of many facts as to [the] issue [of their intentions]."[3] *Id.*

Fed. R. Civ. P. 9(b) provides: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." "[I]n the case of an alleged false representation, it is clear that Rule 9(b) requires the pleading to contain some factual detail, i.e., the

[3] The particularity requirement applies "even when the fraud relates to matters peculiarly within the knowledge of the opposing party." *Hayduk v. Lanna*, 775 F.2d 441, 444 (1st Cir. 1985). However, when the opposing party is the only practical source for discovering the specific facts that would support a pleader's conclusion, less specificity of pleading is required. *Boston & Maine Corp. v. Town of Hampton*, 987 F.2d 855, 866 (1st Cir. 1993).

time, place, and content of the alleged misrepresentation." *Bailey v. Linsco/Private Ledger Corp*., 136 F.R.D. 11, 14 (D. Me. 1991). This the complaint does in paragraphs 11, 13, 17-18, 20, 22, 24, 25, 29, 31, and 33. However, detrimental reliance is also an element of a fraud claim based on misrepresentation, *Kezer v. Mark Stimson Assocs.*, 742 A.2d 898, 905 (Me. 1999), and that element must be pleaded with particularity as well, *VanDenBroeck v. Commonpoint Mortgage Co.*, 210 F.3d 696, 702 (6th Cir. 2000); *In re Nationsmart Corp. Sec. Litig.*, 130 F.3d 309, 321-22 (8th Cir. 1997). Here, the complaint merely alleges that "[p]laintiff justifiably relied upon the information as true and acted upon it, causing him economic loss." Complaint ¶ 61. This allegation does not provide the necessary particularity. Assuming without deciding that a later paragraph of the complaint, included in the count alleging promissory estoppel, may nonetheless be considered in connection with the earlier count for fraud in the evaluation of the sufficiency of the pleadings, the statement that the plaintiff "relied on Defendants' promises by, among other things, paying an earnest money deposit and contracting with professionals to perform work arising from Defendants' promises," *id*. ¶ 78, those allegations are also insufficient. They provide no factual basis by which it may be determined whether the plaintiff actually incurred any detriment as a result of the alleged reliance.

The defendants are entitled to dismissal of Count VI and Count VII, which seeks punitive damages only in connection with the fraud count.

D. Promissory Estoppel (Count VIII)

The defendants argue that the complaint fails to allege that the plaintiff so "irretrievably changed his position" as a result of their alleged promises that to refuse relief would otherwise amount to a fraud on his rights and that Count VIII must accordingly be dismissed. Defendants' Memorandum at 6. They cite *Gagne* in support of this argument, but the Law Court's statement in this regard is directed toward specific performance as a remedy; it was not specifying the elements of the claim.

The Law Court defined the elements of the claim by referring to section 90 of the Restatement (Second) of Contracts.

> Promissory estoppel may be invoked when a "promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."

Gagne, 696 A.2d at 416. To the extent that Count VIII states a claim that is separate from the claims for specific enforcement set forth in Counts II and IV, *see generally Stearns v. Emery-Waterhouse Co.*, 596 A.2d 72, 74 (Me. 1991); *Northeast Inv. Co. v. Leisure Living Communities, Inc.*, 351 A.2d 845, 855 (Me. 1976), the complaint sufficiently pleads the elements of such a claim. *See Chapman v. Bomann*, 381 A.2d 1123, 1126 (Me. 1978). The defendants are not entitled to dismissal of Count VIII.

E. Unfair Trade Practice (Count IX)

Maine's Unfair Trade Practices Act ("UTPA"), 5 M.R.S.A. § 205-A *et seq*., provides in relevant part:

> Any person who purchases or leases goods, services or property, real or personal, primarily for personal, family or household purposes and thereby suffers any loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice declared unlawful by section 207 . . . may bring an action . . . for actual damages, restitution and for other such equitable relief, including an injunction, as the court determines to be necessary and proper.

5 M.R.S.A. § 213(1). Section 207 provides: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are declared unlawful." 5 M.R.S.A. § 207.

The defendants rely on *Binette v. Dyer Library Ass'n*, 688 A.2d 898 (Me. 1996), to support their contention that the transactions set forth in the complaint do not come within the scope of the UTPA. Defendants' Memorandum at 12-13. The plaintiff attempts to distinguish *Binette* on the basis of the facts that defendant Culver "receiv[ed] the property as a bequest and conduct[ed] the sale himself without a broker, and time and again increase[ed] the price" and that Culver "stands to make a

profit of nearly $1 million," Plaintiff's Memorandum at 18, but this attempt is unavailing. The Law Court stated in *Binette* that

> The [defendant] has engaged in the sale of property infrequently but occasionally, when donated property is sold to raise funds for the association's charitable purposes. The association's role in the sale of the Deering property was limited and equivalent to that of a private homeowner listing a residence for sale with a professional real estate agency. No *prima facie* evidence on the record establishes that the [defendant's[sale of the Deering property was in a business context. As a matter of law, therefore, this isolated transaction of the sale by [the defendant] to the Binettes does not constitute the conduct of trade or commerce.

688 A.2d at 907. Accordingly, the Law Court upheld the trial court's entry of summary judgment for the defendant. Nothing in the allegations of the complaint in this case suggests that the sale at issue was other than an isolated transaction by private homeowners selling a residence. As a result, Count IX fails to state a claim upon which relief may be granted.

IV. Conclusion

For the foregoing reasons, I recommend that the defendants' motion to dismiss be **GRANTED** as to Counts VI, VII and IX of the complaint and otherwise **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Date this 7th day of February, 2001.

_____

David M. Cohen

United States Magistrate Judge

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